IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 08-0499

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DAVID W. GUNDERSON,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Gregory R. Todd, Presiding

APPEARANCES:

JOSLYN HUNT
Chief Appellate Defender
139 N. Last Chance Gulch
P.O. Box 200145
Helena, MT 59620-0145

ATTORNEY FOR DEFENDANT
AND APPELLANT

STEVE BULLOCK
Montana Attorney General
TAMMY K PLUBELL
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

DENNIS PAXINOS
Yellowstone County Attorney
P.O. Box 35025
Billings, MT 59107-5025

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS (Cont.)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (Cont.)

OTHER AUTHORITIES

TABLE OF AUTHORITIES (Cont.)

Montana Rules of Appellate Procedure

Appellant Gunderson replies to Appellee's brief as follows.

I. THIS COURT'S DECISION IN *GAITHER* IS SOUND AND CONTROLS HERE.

The State argues that this Court's decision in *State v. Gaither*, 2009 MT 391, 353 Mont. 344, 220 P.3d 640, should be revisited. (Appellee's Br. at 20.)

The *Gaither* decision is sound.

The defendant in *Gaither* received an 85-year sentence for attempted sexual abuse of children, a 10-year sentence for criminal endangerment, and an additional 50-year sentence with 10 years suspended, for a total of 135 years of imprisonment. He argued his 135-year sentence was contrary to Mont. Code Ann. § 46-18-502 and was therefore illegal. *Gaither*, ¶ 51.

Montana Code Annotated § 46-18-502(2) states:

> (2) Except as provided in 46-18-219, an offender shall be imprisoned in a state prison for a term of not less than 10 years or more than 100 years or shall be fined an amount not to exceed $50,000, or both, if:
>
> (a) the offender was a persistent felony offender, as defined in 46-18-501, at the time of the offender's previous felony conviction;
>
> (b) less than 5 years have elapsed between the commission of the present offense and:
>
> (i) the previous felony conviction; or
>
> (ii) the offender's release on parole, from prison, or from other commitment imposed as a result of the previous felony conviction; and
>
> (c) the offender was 21 years of age or older at the time of the commission of the present offense.

This Court stated that the maximum 100-year statutory language of Mont. Code Ann. § 46-18-502(2) is mandatory. Once the district court decides to sentence an offender as a persistent felony offender, this Court noted that Mont. Code Ann. § 46-18-502(2) "states the term of imprisonment *shall be* from 10 to not more than 100 years." *Gaither*, ¶ 54 (emphasis in original). Moreover,

> The PFO statutes do not give the district court the authority to mix and match a PFO sentence with another felony conviction occurring in the same proceeding and exceed the 100-year limit for imprisonment. Once the State opted to seek PFO designation and the District Court proceeded to impose it, the plain language of § 48-16-502(2), MCA, prohibited a term of imprisonment of more than 100 years. Gaither was sentenced under this statute and received a term of imprisonment in excess of 100 years.

Gaither, ¶ 54.

This Court held that Gaither's 135-year sentence was illegal, noting that if the State sought "to sentence Gaither as a PFO in this case, he cannot be imprisoned for more than 100 years." *Gaither*, ¶ 55.

Interestingly, counsel for the State in *Gaither* also authored the State's response brief here. In *Gaither*, the State argued the following:

> The State concedes Gaither is correct in his assertion that under the persistent felony offender statute, Mont. Code Ann. § 46-18-502, the sentence imposed upon a persistent felony offender replaces the maximum sentence for an offense rather than creating a sentence that is imposed **in addition** to the offense. State v. Robinson, 2008 MT 34, ¶ 16, 341 Mont. 300, 177 P.3d 488, citing State v. Fitzpatrick, 247

> Mont. 206, 208, 805 P.2d 584, 585. The State does not concede, however, that the court imposed a sentence beyond the statutory maximum.

(*Gaither* Appellee's Br. at 36-37 (emphasis in original).)

Citing to *State v. Fitzpatrick*, 247 Mont. 206, 805 P.2d 548 (1991), the State in *Gaither* agreed that a persistent felony offender designation replaces the maximum sentence for an offense, rather than creating a sentence that is imposed in addition to the offense. However, now, in Gunderson's case, the State seeks to revisit its *Gaither* argument, and claims the Gaither decision will lead to absurd results: "repeat, persistent felony offenders who have committed more than one offense in a criminal proceeding will be eligible for a lesser sentence than non-repeat, non-persistent felony offenders." (Appellee's Br. at 20.)

In effect, the State asks this Court to remand Gunderson's case so he may receive a sentence akin to the 300-year sentence the defendant in *State v. Watson*, 211 Mont. 401, 686 P.2d 879 (1984) received. First, it should be noted that an individual sentenced to 100 years without the possibility of parole has already been sentenced to life in prison. He does not need to be sentenced to an additional 200 years to fulfill the policy concerns the State now espouses. A single 100-year sentence is a lifetime sentence. Second, the State conceded in *Gaither* precisely what the State now claims will lead to absurd results--that when a defendant is sentenced as a persistent felony offender, the sentence he receives replaces the

maximum sentence for the offense rather than creating a sentence that is in addition to his original offense.

This Court partook in a statutory analysis of Mont. Code Ann. § 46-18-502 and agreed with the State that the plain language of the statute mandates a maximum 100-year sentence for a defendant sentenced as a persistent felony offender. The State does not claim that this statute is unconstitutional. If the State has an issue with the statutory language, it should suggest that change to the Legislature rather than this Court. Moreover, the State asserts that this Court should "revisit" its decision in *Gaither*. Presumably the State wants this Court to overrule its decision, but there is no reason to do so. The precise issue addressed by this Court in *Gaither* was not addressed in *Watson* or *Fitzpatrick*. The *Gaither* decision was handed down years after the *Watson* and *Fitzpatrick* decisions. And, again, the State takes contrary positions from its *Gaither* brief and its arguments here.

This Court's decision in *Gaither* should not be revisited. Instead, it should be applied to Gunderson's situation to hold that his sentence is illegal. His case must be remanded for resentencing.

II. NO EVIDENCE EXISTED AS TO ATTEMPTED OR INTENDED PENTRATION; CONSEQUENTLY, INSUFFICIENT EVIDENCE EXISTED TO CONVICT GUNDERSON OF ATTEMPTED SEXUAL INTERCOURSE WITHOUT CONSENT.

Gunderson stands on his argument raised in Appellant's Brief at 20-22, that he did not attempt nor intend penetration. Without facts showing he attempted or intended penetration, every attempted or completed sexual assault would likewise amount to sexual intercourse without consent, and the statutory distinction between these crimes would be moot.

Sexual assault occurs where a person knowingly subjects another person to any sexual contact without consent. Mont. Code Ann. § 45-5-502. Sexual intercourse without consent occurs where a person knowingly has sexual intercourse without consent with another person. Mont. Code Ann. § 45-5-503. "A person commits the offense of attempt when, with purpose to commit a specific offense, the person does any act toward the commission of the offense." Mont. Code Ann. § 45-4-103(1).

As Gunderson previously asserted, the difference between attempted misdemeanor sexual assault and attempted felony sexual intercourse without consent is attempted penetration. (*See* Appellant's Br. at 21.)

Here, it is undisputed there was no penetration or attempted penetration. (Appellee's Br. at 7, citing Trial at 209-10.) There was no bruising. There were no blood spots on the sheets. There was no rape. Gunderson never even removed

his pants. Gunderson maintained that he did not attempt or intend penetration. The evidence showed as much. Hence insufficient evidence existed to convict him of attempted sexual intercourse without consent.

III. COUNSEL WAS INEFFECTIVE.

Gunderson stands on his arguments raised in Appellant's Brief at 22-25, that counsel provided ineffective assistance of counsel; he failed to investigate, call witnesses, impeach Randall, challenge a biased juror for cause, object to imposition of disjunctive mental state jury instructions, and object to imposition of fifty-one conditions.

A. Abandonment Defense

The State claims that "Gunderson has failed to prove how making such an argument [abandonment] to the jury would have changed the outcome of the case." (Appellee's Br. at 32.)

There was never penetration or bodily injury. A person is not guilty of attempt if "under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, [he] avoided the commission of the offense attempted by abandoning [his] criminal effort." Mont. Code Ann. § 45-4-103(4). Based on the facts presented to the jury, if counsel had pursued the abandonment defense, it is possible that the jury would have concluded that Gunderson avoided commission

of the offense of attempted sexual intercourse without consent given that he did not attempt or intend penetration. In fact,

> This Court has stated that an overt act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. In addition, the Court stated that there must be at least some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter.

State v. Ribera, 183 Mont. 1, 597 P.2d 1164, 1170 (1979) (citations omitted). The defendant in *State v. Mahoney*, 264 Mont. 89, 870 P.2d 65 (1994) argued that he could not have been found guilty of the crimes of attempted deliberate homicide and attempted sexual intercourse without consent because he voluntarily abandoned his criminal efforts. *Mahoney*, 264 Mont. at 96-97, 870 P.2d at 69-70.

With regard to the attempted sexual intercourse without consent, this Court stated the following:

> Moreover, Mahoney forcibly pulled down Ms. Brandt's pants, lifted her shirt up, cut her bra straps and attempted to have sexual intercourse with her. Notwithstanding that she was seriously wounded from the stabbing, Ms. Brandt resisted the defendant's attack by holding her hands in front of her genitals to prevent him from having sexual intercourse. Mahoney himself stated in the proceeding to change his plea to guilty that his intent was to have sexual intercourse with the victim. These actions by Mahoney likewise unequivocally established that at least some fragment of the crime of sexual intercourse without consent was committed and that such actions reached far enough towards the accomplishment of the desired result to amount to the commencement of the consummation.

Mahoney, 264 Mont. at 98, 870 P.2d at 71.

The State hypothesizes that if counsel had raised an abandonment defense, "the State would have responded that Gunderson fled because once Stephanie [Randall] turned the light on she could identify Gunderson, thus he could not complete the rape and go undetected. Further, Gunderson fled because Stephanie [Randall] was screaming and fighting thereby risking that neighbors would hear and intercede." (Appellee's Br. at 32.)

These hypothesized responses, however, fail to show that the jury's outcome would not have been different had counsel pursued an abandonment defense. Because, unlike *Mahoney*, Gunderson denied any sexual motivation, and Randall confirmed that Gunderson never had his pants off; he never exposed himself; he never touched her breasts that were exposed; he never put his hand inside of her underwear; he never hit her; and he never threatened her. Indeed, Randall stated to police that there was "no sexual contact" between Gunderson and herself. (Trial at 165-68.)

Had counsel pursued an abandonment defense, it is possible that the jury would have found on these facts that even a fragment of the crime of attempted sexual intercourse without consent was not committed that reached far enough towards the accomplishment of the desired result, regardless of the State's hypothesized responses.

B. Lesser-Included Instruction

Regarding the lesser-included jury instruction, the State claims that "Gunderson fails to set forth the evidence that would have warranted defense counsel requesting the lesser included offense instruction of Criminal Trespass. Further, Gunderson denied that he touched any of Stephanie's [Randall's] intimate body parts," so his testimony, "if believed, would support a complete acquittal, not a conviction for Attempted Sexual Assault." (Appellee's Br. at 32-33.)

These above-quoted statements amount to the State's full response to Gunderson's argument. First, criminal trespass is a lesser-included offense of burglary. *State v. Harvey*, 219 Mont. 402, 406, 713 P.2d 517, 519 (1986).

The fact that he may have been acquitted if the lesser-included was given is not the law that dictates whether a lesser-included instruction should be given. Rather, a defendant is entitled to a lesser-included instruction if (1) the offense constitutes a lesser-included offense under Mont. Code Ann. § 46-1-202(9); and (2) sufficient evidence exists to support a lesser-included instruction. *See State v. Feltz*, 2010 MT 48, ___ Mont. ___, ___ P.3d ___; *State v. Cameron*, 2005 MT 32, ¶ 20, 326 Mont. 51, 106 P.3d 1189.

An included offense is one that "is established by proof of the same or less than all the facts required to establish the commission of the offense charged." Mont. Code Ann. § 46-1-202(9)(a). "'[T]he term, 'facts,' refers to the statutory

elements of the offenses, not the individual facts of the case.'" *State v. Matt*, 2005 MT 9, ¶ 13, 325 Mont. 340, 106 P.3d 530 (*quoting State v. Beavers*, 1999 MT 260, ¶ 30, 296 Mont. 340, 987 P.2d 371).

Again, sexual assault occurs where a person knowingly subjects another person to any sexual contact without consent. Mont. Code Ann. § 45-5-502. Sexual intercourse without consent occurs where a person knowingly has sexual intercourse without consent with another person. Mont. Code Ann. § 45-5-503. Sexual intercourse means

> (a) *penetration* of the vulva, anus, or mouth of one person by the penis of another person, *penetration* of the vulva or anus of one person by a body member of another person, or *penetration* of the vulva or anus of one person by a foreign instrument or object manipulated by another person to knowingly or purposely:
>
> (i) cause bodily injury or humiliate, harass, or degrade; or
>
> (ii) arouse or gratify the sexual response or desire of either party.
>
> (b) For purposes of subsection (68)(a), any *penetration*, however slight, is sufficient.

Mont. Code Ann. § 45-2-101(68) (emphasis added). Sexual contact means "touching of the sexual or other intimate parts of the person of another, directly or through clothing, in order to knowingly or purposely: (a) cause bodily injury to or humiliate, harass, or degrade another; or (b) arouse or gratify the sexual response or desire of either party." Mont. Code Ann. § 45-2-101(67).

Sexual Intercourse Without Consent, Mont. Code Ann. § 45-5-503	**Misdemeanor Sexual Assault, Mont. Code Ann. § 45-5-502**
Knowingly	Knowingly
Have sexual intercourse with another person	Have sexual contact with another person
Without consent	Without consent

As the chart shows, sexual assault is established by proof of the same or less than all the elements required to establish the commission of sexual intercourse without consent. That is, the only difference between felony sexual intercourse without consent and misdemeanor sexual assault is the act of sexual intercourse or sexual contact. Sexual intercourse requires penetration. Sexual contact requires touching of intimate parts. The touching of intimate parts does not include penetration. Accordingly, sexual intercourse is a more invasive action than touching. And, the act of sexual contact, then, is an element that is less than that of penetration. Hence, misdemeanor sexual assault is an included offense of sexual intercourse without consent as a matter of law in Montana.

"Whenever the record contains *any* evidence upon which the jury might rationally conclude a defendant is guilty of a lesser offense included in the offense charged, the court *must* instruct the jury as to that lesser included offense." *State v. Reiner*, 179 Mont. 239, 251-52, 587 P.2d 950, 957 (1978) (emphasis added).

Here, there was evidence that would have supported a lesser-included instruction of sexual assault. The jury could have rationally concluded that by

touching Randall, kissing her, and pulling aside her underwear, Gunderson had not attempted to penetrate her vulva or anus. And instead, he had touched her intimate parts. Hence, the jury could have found him guilty of misdemeanor sexual assault. However, the jury was not afforded that option because Gunderson's counsel failed to pursue a lesser-included instruction as to sexual assault. There could have been no tactical reason for counsel not to pursue a lesser-included instruction as to sexual assault, in light of the evidence presented at trial. Counsel was thereby ineffective. By not pursuing the lesser-included instruction, again, Gunderson was prejudiced because the jury did not have available to it the option of a lesser-included instruction. The district court should have instructed the jury as to the lesser-included offense, as well. The district court erred in not doing so.

IV. GUNDERSON WAS ENTITLED TO A MISSING EVIDENCE JURY INSTRUCTION.

Gunderson stands on his argument raised in Appellant's Brief at 22-36, with the additional reply that he has not changed his theory on appeal. Gunderson still asserts as he did before the district court that the cops have a duty to collect the evidence. The cops failed to do so; hence the need for the missing evidence instruction. A duty to collect and a failure to seize is the same theory. The cops have a duty to collect evidence. When they failed to seize the evidence, Gunderson was entitled to a missing evidence jury instruction. A duty to collect

does exist based on the same arguments articulated in Gunderson's opening brief and the arguments delineated in *State v. Taylor*, DA 09-0246.

V. A PROSPECTIVE JUROR'S COMMENTS REGARDING GUNDERSON HAVING BEEN IN JAIL NECESSITATES A MISTRIAL.

Gunderson stands on his argument raised in Appellant's Brief at 37, that one of the prospective jurors stated he was familiar with Gunderson since that prospective juror was a jailor. The inference from that statement was that Gunderson "must be some type of trouble maker." (D.C. Doc. 67 at 8.) Such an inference is akin to the due process violation arising from a juror seeing a defendant in shackles or prison attire at trial. *See e.g.*, *Estelle v. Williams*, 425 U.S. 501, 504-05 (1976) (prison attire); *State v. Merrill*, 2008 MT 143, ¶ 12, 343 Mont. 130, 183 P.3d 56 (shackles). This taint cannot be removed nor can it be considered harmless.

VI. UNDER A PLAIN ERROR ANALYSIS, THIS COURT SHOULD REVERSE GUNDERSON'S CONVICTION BASED ON THE FAILURE TO REMOVE A PROSPECTIVE JUROR WHO INDICATED A BIAS.

The State contends that Gunderson failed to provide analysis as to why plain error review of the jury instruction issues was necessary. (Appellee's Br. at 38.)

Gunderson did not just assert plain error. What is necessary when asserting plain error is making the argument why this Court should invoke the doctrine and how a defendant's substantial rights are affected. *State v. Finley*, 276 Mont. 126,

136, 915 P.2d 208, 215 (1996). Gunderson did so here. He argued why plain error review was necessary, namely because one of the jurors said charging documents were evidence and that she would "probably have more of a bias that he is [guilty] simply because he's charged." (Appellant's Br. at 38.)

Just as in *State v. Braunreiter*, 2008 MT 197, 344 Mont. 59, 185 P.3d 1024, this prospective juror had a fixed state of mind and counsel should have removed her for cause.

VII. DISTRICT COURT ERRED WHEN IT FAILED TO GIVE A JURY INSTRUCTION INDICATING THAT GUNDERSON'S TESTIMONY SHOULD BE TREATED THE SAME AS ANY OTHER WITNESS.

Gunderson stands on his argument raised in Appellant's Brief at 38-39. The proposed jury instruction was not repetitive. The State claims that Gunderson has failed to comply with the appellate rules because he only cited to a Ninth Circuit model jury instruction. (Appellee's Br. at 41.)

However, the appellate rules indicate that counsel must cite authority and Gunderson did so. *See* Mont. R. App. P. 12(f). The authority for his argument came from the Ninth Circuit model jury instruction, which indicates that when a defendant testifies, his testimony should be treated just as testimony of other witnesses is treated. Such an instruction was necessary to offset the instruction that jurors may consider whether witnesses have interests in the outcome of the case. (5/23/08 Tr. at 2-3; Trial at 452; D.C. Doc. 67 at 2-3.)

VIII. UNDER A PLAIN ERROR ANALYSIS, THE JURY WAS IMPROPERLY GIVEN DISJUNCTIVE INSTRUCTIONS ON GUNDERSON'S MENTAL STATE.

The State contends that Gunderson "has offered no analysis of why plain error review is appropriate" regarding the disjunctive jury instructions. That statement amounts to the State's full response to the issue. (*See* Appellee's Br. at 38.)

Again, the analysis that must be undertaken in asserting plain error is to argue that counsel failed to raise the issue before the district court, but that this Court should still review the issue because declining to do so would affect the defendant's substantial rights. *Finley*, 276 at 136, 915 P.2d at 215. Gunderson did that.

In fact, Gunderson said "the 'purposely' and the 'knowingly' definitions given to the jury were disjunctive statements indicating that the terms could refer either to conduct or result. These disjunctive definitions relieved the State from having to prove every element of the offenses[.]" (Appellant's Br. at 39.) Gunderson likened his situation to that of Patton's, whereby this Court held that the purposely instruction was erroneous because it allowed the jury to convict him on the basis of whether he consciously engaged in conduct without regard to whether he intended the harm. *State v. Patton*, 280 Mont. 278, 290-91, 930 P.2d 635, 642-43 (1996). (Appellant's Br. at 39-40.)

Such an argument by Gunderson cannot be said to provide no analysis as the State asserts. Gunderson argued that counsel did not challenge the jury instruction definitions and by not doing so, impermissibly allowed the jury to convict him. The State was relieved of having to prove every element and it was unclear as to whether the jury was convicting him for conduct or result.

IX. GUNDERSON ACCEPTS THE STATE'S CONCESSION AS TO THE IMPOSITION OF PAROLE CONDITIONS.

According to the Appellee's brief, "[t]he State concedes that for all practical purposes the conditions imposed amount to conditions of parole, and with the exceptions of the conditions specifically authorized by statute, the court did not have authority to impose the conditions." (Appellee's Br. at 41.)

As Gunderson asserted in his opening brief, with the exception of certain employment and contact conditions on sexual or violent offenders (*See State v. Dennison*, 2008 MT 344, ¶¶ 12-15, 346 Mont. 295, 194 P.3d 704; *State v. Burch*, 2008 MT 118, ¶¶ 14-31, 342 Mont. 499, 182 P.3d 66; Mont. Code Ann. § 46-18-255), the remaining fifty-one parole conditions imposed upon Gunderson were illegal and should be stricken. (Appellant's Br. at 41.) Hence, with the State's concession, those conditions should be stricken but for the conditions discussed in *Dennison*, *Burch*, and Mont. Code Ann. § 46-18-255.

CONCLUSION

For the reasons stated herein, this Court should dismiss or reduce Gunderson's conviction for attempted sexual intercourse without consent and should reverse and remand his case.

Respectfully submitted this _____ day of March, 2010.

OFFICE OF THE STATE PUBLIC DEFENDER
Appellate Defender Office
139 N. Last Chance Gulch
P.O. Box 200145
Helena, MT 59620-0145

`

By: _____
JOSLYN HUNT
Chief Appellate Defender

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing reply brief of Appellant to be mailed to:

STEVE BULLOCK
Montana Attorney General
TAMMY K PLUBELL
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

DENNIS PAXINOS
Yellowstone County Attorney
P.O. Box 35025
Billings, MT 59107-5025

DAVID W. GUNDERSON 11820
Great Falls Regional Prison
3800 Ulm North Frontage Road
Great Falls, MT 59404

DATED:_____ _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 5,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

_____

JOSLYN HUNT